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No. 724.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellants,

v.

CHICAGO HEIGHTS TRUCKING CO. et al.,

Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois.

BRIEF FOR THE APPELLEES.

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BRIEF FOR THE APPELLEES.

STATEMENT OF THE CASE.

Appellants' Statement.

Contrary to Rule 27 (2) (e) of the rules of this Court, Appellants' brief fails to specify the assigned errors upon which they rely in this Court. Indeed, as will be pointed out hereinafter, contentions now are advanced which were not assigned as error. The evidence introduced before the Com-

mission was undisputed. In the Court below, appellees contended that the findings of the Commission upon which the order was based not only were unsupported by any evidence, but were contrary to the evidence, and this, the lower Court expressly found to be the case. The duty, therefore, devolved upon appellants to point out in their brief the evidence which did support the findings of the Commission upon which they rely. This appellants have not even attempted to do.[1] The lower Court made nineteen findings of fact which cover every issue involved. Appellants assigned as error only five of these findings,[2] and if we interpret their brief correctly, now urge only one of these assignments, i. e., assignment of error No. 25 that the Court below erred in findings Nos. 15 and 16 that the suspended tariffs clearly and accurately state the charges, etc. Under these circumstances, we take it that the findings of fact made by the Court below, except in the particulars noted, will be accepted as the facts which were before the Commission. We therefore set out as our statement of the evidence before the Commission, the findings of the lower Court, to which we have appended reference to all evidence bearing thereon.

Findings of Fact by Court Below. (R. 490)

1. Plaintiffs are common carriers of property by motor vehicle and subject to the Motor Carrier Act, 1935, and operate over public highways in the States of Illinois, Wisconsin, and Indiana. (R. 2, 58, 61, Exhibit 2, R. 237)

2. In October and December, 1937, plaintiffs caused three tariffs to be filed with the Interstate Commerce Commis-

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1 Reference to the Record of testimony is made in appellants' brief in only three instances and in each case to a single (and the same) exhibit.

2 Finding 3, R. 490, Assignment (1), R. 496;
Finding 4, R. 490, Assignment (2), R. 496;
Finding 14, R. 492, Assignment (24), R. 498;
Findings 15 and 16, R. 492, Assignment (25), R. 498.

sion, naming rates on less-than-carload interstate shipments of "all freight" (with certain exceptions not necessary to name) immediately preceding or following transportation thereof as part of a consolidated truckload or carload consignment between (a) Chicago, Illinois, upon the one hand, and points in Wisconsin and Illinois, upon the other, and (b) Indianapolis, South Bend, Fort Wayne, Muncie, and Evansville, Indiana, upon the one hand, and points in Indiana within the respective trade areas of each of said cities, upon the other. (R. 3, 58, 61, Exhibit 1, R. 204)

3. The aforesaid tariffs were suspended by the Commission, on its own motion, without complaint, by its orders of November 29, 1937, and January 14, 1938, and following the hearing provided in the Motor Carrier Act and a report by the examiner recommending that the tariffs be found lawful, a division of the Commission found the rates named in the tariffs to be unlawful and ordered the tariffs canceled. Upon rehearing, the entire Commission affirmed this order, but upon findings substantially different from those made by the division. (Recommended Report, R. 46; Report of Division 5, R. 29; Report of Commission, R. 13)

4. While the tariffs are not restricted and apply to the traffic of all shippers, (R. 85) the principal traffic which will be carried under the suspended rates is what is called by the Commission "freight forwarder traffic". This traffic consists of individual less-than-carload shipments of freight originating or terminating at points far distant from the lines and routes of plaintiffs, and carried in a coordinated railroad and motor carrier service under the control and direction of common carrier organizations known as "freight forwarders". (R. 80, 81. See also R. 97, 125, 128, 133, 147, 151)

5. The method by which said freight is carried is as follows: Plaintiffs jointly with other carriers, forwarder, rail and motor, maintain a nation-wide sales and service organization whereby individual less-than-carload shipments are collected at the door of the shipper from all producing points in each marketing area, concentrated by motor truck at the market center of the area, consolidated with other similar shipments, and moved in consolidated car lot or truck lot consignments to a breakbulk station located at the center of the consuming trade area from which the individual less-than-carload shipments are distributed to the door of the consignee. Plaintiffs perform the concentration and distribution service, between concentration and breakbulk stations located in the cities named in paragraph 2, supra, and points within the trade area of each (R. 76, 77).

6. This coordinated transportation of plaintiffs has resulted in a more complete, dependable, and reliable service generally superior to either all-rail or all-truck competitive services, as a result of which it is widely patronized by shippers.[3]

7. The "forwarder traffic," which would be carried under these tariffs, at the present time and for a number of years prior, is and was carried under joint tariffs of plaintiffs, freight forwarding carriers, and other motor carriers, now on file with the Commission, naming through rates on the less-than-carload shipments from ultimate point of origin to ultimate destination, which tariffs were ordered stricken from the files of the Commission by an order is-

[3] More expeditious and flexible than any available transportation service.—Shipper testimony: R. 150, 130, 102; Carrier testimony: R. 141, 172, 197. Widely patronized by shippers because it is faster, more complete, dependable, reliable and generally superior to any other method of transportation.—Shipper testimony: R. 96, 97, 98, 99, 101, 104, 106, 108, 110, 111, 120, 124, 126, 127, 128, 129, 130, 132, 133, 134, 135, 146, 147, 148, 149, 151.

sued at about the same time as the order which this proceeding seeks to annul and enjoin (R. 76).

8. Plaintiffs' compensation, in the form of divisions of the joint rates described in paragraph 7, presently and formerly received for their services in connection with the transportation of such traffic, is practically identical with the compensation which plaintiffs would receive for like services under the suspended tariffs (R. 91, 137, 140, 142, 113, 121, 182).

9. Plaintiffs contemporaneously maintain what are called "local rates" upon less-than-carload freight, originating or terminating at the points named in paragraph 2 hereof, which differ from the suspended rates in that such freight shipments are classified into a number of different classes, each taking a different rate, some of which rates are higher and some lower than the suspended rates, which latter rates apply on all freight, regardless of classification. The average revenue per 100 pounds derived by plaintiffs from such local rates, upon the whole, is less than the average revenue per 100 pounds which will be produced by the suspended rates for movement between the same points (R. 94, 115, 185).

10. The service which will be provided by plaintiffs under the suspended rates is identical with the service which they now perform in the carriage of through interline shipments under existing joint tariffs with other motor carriers with whom plaintiffs connect, and the suspended rates are substantially higher than the divisions which plaintiffs receive for their services for the carriage of such interline traffic (R. 93, 94, 114, 162, Ex. 13, R. 327).

11. The service which plaintiffs will be required to provide under the suspended tariffs is different and less than it is required to provide for traffic moving at its tariffs of

local rates, in that (a) no solicitation or billing is necessary (R. 162); (b) but one instead of two terminal services (collection, delivery, and station platform handling) is required (R. 91, 143, 186, 190, 192); and (c) relatively fewer deliveries are required (R. 91, 93, Exhibit 7, R. 281, 288, 305); and (d) the expense of providing such service under the suspended tariffs will be less than the expense of the service required in the transportation of such local traffic (R. 94, 159, 143, 186, 190, 198).

12. The traffic which will be handled under the suspended rates consists of through interline shipments and either originates or terminates on plaintiffs' lines, whereas the traffic handled at plaintiffs' local rates consists of local shipments which both originate and terminate on plaintiffs' lines (R. 76, 77, 91).

13. Movement of the traffic which will be carried at the suspended rates is affected and influenced by commercial, economic, and competitive conditions, applicable to long-distance commerce between points on plaintiffs' routes and points in all other states, whereas the movement of plaintiff's local traffic is influenced by the local commercial conditions applicable in the restricted trade areas about each of the cities named in paragraph 2. (R. 89, 91, 104, 107, 121, 135, 147.)

14. There is no evidence or claim that any particular person, port, gateway, locality, or description of traffic will be injured or damaged, or occasioned any loss by operation of the suspended tariffs.

15. The suspended tariffs explicitly state the applicable rates and accurately describe the service to be rendered (and the rules applicable thereto) for such rates.[4]

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[4] Typical Tariff: Title page—R. 213; Table of contents—R. 214; Participating carriers—R. 214; Application of rates—R. 217; Rules and Regulations—R. 220; Rate table—R. 223.

16. The suspended tariffs plainly state the charges which are proposed to be made thereby and the time when such charges will take effect.[5]

17. Enforcement of the order of the Commission will deprive plaintiffs of a large and profitable part of their revenues [(a) Would deprive appellees of traffic: R. 161, 164, 175, 176, 177, 178, 181, 183; (b) Resultant injury: R. 164, 137, 139, 141, 143, 186, 187, 196, 197, 166].

Commission's First Report.

The original report of the Commission by Division 5 held the rates were unreasonable, finding, (1) it was "questionable whether the proposed rates may properly be considered as true proportional rates * * * and whether the traffic is through traffic" (R. 35); (2) that a "serious question was raised whether the proposed rates will be reasonably compensatory" (R. 36); (3) that "the rates here proposed are in their true nature, special rates for a particular type of shipper" (R. 38); (4) "the record is not convincing" that appellees would lose the traffic (R. 39); and finally (5) that the suspended rates would "tend to perpetuate such all-commodity rates'" (R. 36).[3]

Appellees filed a petition for reconsideration upon the ground that each of the above findings were unsupported by and contrary to the undisputed evidence before the Commission (R. 448).

Commission's Final Report.

The final report of the Commission did not affirm the finding of the original report that the suspended rates were unreasonable (except with respect to the "so-called quantity and truckload proportional rates" [R. 20], an issue which was

[5] Typical Tariff: Rate table—R. 223; Effective date—R. 213.

[3] For a more complete analysis of the findings of the original report, see Chairman Eastman's dissenting opinion beginning at bottom of page 2 of Record.

not even discussed in the report), but condemned the rates solely upon the ground of discrimination under section 216 (d), and lack of clarity and adequate policing rules under section 217 (a) and (c), finding (1) that the suspended rates were "materially lower than respondents' local rates on like traffic between the same points (R. 18); (2) that the difference in nature and extent of the services required under the suspended rates was due to the voluntary action of appellees in adopting a different method of handling such freight, and that, therefore, the rates would provide "transportation at rates lower than the rates which will be charged certain other shippers under substantially similar circumstances and conditions, in violation of section 216 (d)" (R 19). With respect to the violation of section 217 (a) and (c) of the Act, it found (3) that the rates "are not what they purport to be" (i. e., true proportional rates) and are therefore lacking in the clarity and definiteness required by that section (R. 17); and (4) that "the tariffs naming these rates contain no adequate policing rules for insuring that property shipped under these rates has in fact been transported or is to be transported as part of a carload or truckload shipment. * * * There is no evidence that respondents would have any way of enforcing provisions against substitution of property originating at or destined to the reforwarding points, even if such provisions were incorporated in the tariffs" (R. 19, 20).

"Problem of the Forwarder."

As will appear from a consideration of the issues and record in this case, much that is said in appellants' brief (page 7), under the caption "The problem of the forwarder," is irrelevant. In view of what is said, we feel it is appropriate for a little clearer statement of the problem to be made. This statement is based upon the findings of the

Commission in the several cases which are referred to in appellants' brief and the testimony in this record.[4a]

Freight forwarding is a method of transporting packages of less-than-carload freight by coordinating the operations of different types of carriers, rail, water and truck, and integrating their services by a common agency, the forwarder. Prior to the development of motor truck transportation, forwarders were engaged merely in the pooling of less-than-carload shipments into carload shipments between two railroad terminals. It was not possible for them to serve any except the great cities, in this operation. With the advent of the motor carriers, it was possible to coordinate their services with those of the rails so that now the entire United States is served by three of the largest forwarding companies.[4b] The operations of a typical forwarder were thus described by the Commission in *Acme Fast Freight, Inc., Common-Carrier Application*, 8 M. C. C. 211 (p. 223):

> "* * * What applicant undertakes to do is to see to it that goods are carried from a point of origin to a point of destination, and to utilize for this purpose the services of carriers by rail, by water, or by motor vehicle, separately or in combination, in whatever way will accomplish the purpose most economically and expeditiously. In this undertaking it is a common carrier under the common law, as we have found. Applicant issues to the shipper its own bill of lading, takes custody of and assumes liability for the shipment while in course of transportation, and charges rates covering the entire service. * * *"

[4a] Freight Forwarding Investigation, 229 I. C. C. 201; Acme Fast Freight, Inc., 8 M. C. C. 211; Acme Fast Freight, Inc., v. United States, 30 F. Supp. 968.

[4b] The claim of appellants that forwarding companies are "middlemen of the transportation business" (Brief p. 7) is without basis in the record and factually inaccurate to the point of being misleading. This record clearly shows, and the Commission concedes, that the forwarder is not a "dealer" but provides an essential transportation service.

The aggregate annual revenues of these companies is in excess of 100 million dollars, is nearly as much as the aggregate l. c. l. revenue of the Railway Express Company, and approximately 40 percent as great as the combined less than carload (l. c. l.) revenue of all railroads. These forwarding companies operate upon a very narrow margin, it appearing that after payment of the transportation costs of the carriers and their own very substantial costs in assembling, handling, collecting and distributing the freight, their profit is less than 1 cent per 100 pounds.

In the *Freight Forwarding Investigation*, 229 I. C. C. 201, the Commission held, page 299:

> "There can be no doubt that the forwarder method of handling traffic has made for itself an important place in the transportation field. It should exist, however, independent of the abuses portrayed upon this record, most of which impose a burden of unnecessary expense upon the rail lines. The forwarder method of shipment generally has served to promote transportation economy by concentrating traffic. If this achievement had not been attended by the practices of the rail lines in extending unduly advantageous treatment to this class of traffic, there might have been no occasion for this investigation."

One reading appellants' brief might receive the impression that the abuses which the Commission found in the Freight Forwarding Investigation have something to do with the rates involved in this case. Nothing could be further from the facts.

We set out in a footnote the findings made by the Commission in that case.[5]

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[5] 1. Rents paid by forwarders to railroads at a few stations found inadequate. 229 I. C. C. 217;

2. Car service rule of certain carriers found unreasonable. 229 I. C. C. 230; (The case subsequently was reopened and a new hearing has been held with respect to this finding.)

History of Rates.

At concentration points a forwarder consolidates a number of individual l. c. l. shipments into a single carload which it consigns *as a shipper*. With respect to this consignment, or the railroad which transports the car, the shippers of the individual l. c. l. shipments included therein have no relation whatever. When forwarders and truck lines instituted the present coordinated service to the small cities lying beyond the concentration or breakbulk depots, an entirely different situation arose. In every such case there is a direct shipper-carrier relation between the shipper of the l. c. l. shipment and the truck line which originates or terminates that shipment, as well as between the shipper and the forwarder who provides the remainder of the transportation. In respect to these l. c. l. shipments, the relation between the truck lines and the forwarders has not heretofore been that of shipper and carrier, but that of joint carriers providing a single coordinated service. The Motor Carrier Act specifically includes forwarding companies by name as carriers, at least some of whose operations are subject to its provisions. Assuming that all their operations were subject to this Act, the forwarders complied with its provisions including provisions requiring the filing of tariffs.

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3. Tariff rates for loading and unloading of forwarder freight found less than actual cost and unlawful. 229 I. C. C. 236;
4. New rule provided for the billing of all-commodity freight. 229 I. C. C. 242;
5. Constructive stop-off rules of certain carriers found unreasonable. 229 I. C. C. 251; (Case subsequently reopened and new hearing held with respect to this finding; no decision as yet.)
6. Several instances of split receipt or delivery of carload shipments found unlawful. 229 I. C. C. 256;
7. Several instances of expedited handling of forwarder traffic found unlawful. 229 I. C. C. 263;
8. Failure of railroads to render freight bills promptly, although requested by forwarders, found unlawful. 229 I. C. C. 263;
9. Operations of certain railroad transport or express companies found unlawful. 229 I. C. C. 286;
10. Railroad ownership of forwarding companies found unlawful. 229 I. C. C. 297.

These tariffs were received by the Commission and for several years treated as were other tariffs. Included among these tariffs were those naming joint through rates between points on appellees' lines and far distant points on other lines, out of which joint rates, appellees received for their part of the service, compensation in the form of divisions. Subsequently the Commission found that although forwarders are common carriers, their operations are not subject to the Act, and that the legality of the joint rates was questionable.[6] To remove all question of legality, appellees filed these tariffs, under which the forwarder, for the first time, will become the technical shipper of the l. c. l. shipment. While this proceeding was pending, the Commission ordered the joint tariffs of appellees and the forwarders stricken from its files, effective June 11, 1940.[7] On this date, unless the tariffs here involved have become effective, a large part of appellees' business will be swept away and some of appellees ruined.

Appellants' repeated statement that the suspended rates "perpetuate advantages" to the forwarders is subject to an interpretation which is contrary to the record. Considered as shippers, the forwarders represent a class which differs greatly from any other shipper. As a class, they compete with no other shipper. The only "advantage" which would accrue from the suspended rates is that appellees and the forwarders will be able to continue to render this coordinated service. Indeed, forwarders now render this "off-line" service with little, if any, profit, and unless these tariffs become effective by June 11, they will be unable to render it at all (R. 179, 181). *The people who will be hurt are appellees, in that they will be deprived of the traffic, and the shippers at many small cities who will*

[6] Acme Fast Freight, Inc., 8 M. C. C. 211.

[7] Acme Fast Freight, Inc., 17 M. C. C. 549. Decree of the District Court of the Southern District of New York dismissing a bill to review this order, 30 Fed. Sup. 968, was affirmed by this Court, per curiam, on April 8, 1940.

be deprived of an essential service (R. 100, 120, 125, 132, 149, 153).

Truckload Rates.

For the first time in this proceeding *(it was not assigned as error)* appellants raise the question that the decree of the lower Court was too broad in that it sustained the provisions in relation to truck load rates, in one of the suspended tariffs, applying only between Chicago, Illinois, and Milwaukee, Wisconsin. This provision of the tariff is shown at the top of page 213 of the Record. No evidence was introduced respecting the rates, rules and regulations named in this item and the Examiner found that it was unlawful (R. 56), and appellees filed no exceptions to this finding of the Examiner (R. 43). This finding was sustained by the original report of Division 5 and no exception was taken thereto by appellees in their petition for reconsideration (R. 22, 448). Subsequently, the finding was reaffirmed in the final report of the Commission (R. 20), with respect to which no error was assigned by appellees in their bill (R. 9).

DEFINITION OF ISSUES.

1. Do the suspended rates subject any person or traffic to unjust discrimination? (Conclusion VI of Court below, R. 493.)

(a). Was there any evidence that disadvantage or injury would be suffered by anyone because of the suspended rates? (Conclusion I, Finding 14.)

(b) Is compensation under suspended rates lower than that under local rates? (Conclusion II, Findings 8 and 9.)

(c) Is the service to which the suspended rates are applicable like the service to which local rates are applicable? (Conclusion III, Findings 4, 10 and 11.)

(d) Is the traffic to which the suspended rates are applicable like the traffic to which local rates are applicable? (Conclusion IV, Findings 4 and 12.)

(e) Will the traffic to which the suspended rates are applicable be transported under similar circumstances and conditions as those under which local traffic is transported? (Conclusion V, Findings 4, 6 and 13.)

2. Are the tariffs technically deficient? (Conclusion VII.)

(a) Are the policing rules of the tariffs inadequate? (Finding 15.)

(b) Is the application of the rates clearly and explicitly stated? (Findings 15, 16.)

3. Will the enforcement of the order irreparably injure appellees by depriving them of their business? (Conclusion X, Finding 17.)

SUMMARY OF THE ARGUMENT.

Rates Not Discriminatory.

Section 216 (d) of the Motor Carrier Act makes it unlawful for a common carrier by motor vehicle (1) to *give* "any undue or unreasonable preference or advantage to any particular person, * * * or description of traffic," or (2) "to *subject* any particular person, etc., to any *unjust discrimination* or any undue or unreasonable prejudice or disadvantage." (Emphasis supplied.) The Commission does not find that any particular person or any description of traffic *was subjected* to any unjust discrimination or any undue or unreasonable prejudice or disadvantage, but merely that the rates under consideration would cause *unjust discrimination* in favor of certain shippers. In reaching this conclusion, it is necessary to hold that the phrase "unjust discrimination," which occurs only in the second clause of section 216 (d), is to be incorporated also in the first clause of that section. Since it is tacitly admitted that no particular person or description of traffic is disadvantaged or injured by the suspended rates, it follows that unless this strained interpretation is made, the rates are not unlawful as a matter of law. But even if proof of disadvantage or injury to some particular person or description of traffic is not necessary to constitute "unjust discrimination," as that phrase is used in section 216 (d), and if the Commission is right in its construction of the meaning of that phrase in that section, its finding still is arbitrary and unreasonable because none of the requisite elements to constitute "unjust discrimination" is present in this case. As correctly held by the Court below (1) *the compensation* to be charged under the suspended tariffs *is not less* than that applicable on other traffic between the same points, (2) the *transportation service* to be accorded under these tariffs is *greatly different and less* than that required for other traffic, particularly local traffic, in that one complete terminal service, including pick-up or de-

livery, billing, sorting and consolidation, is eliminated, and the traffic handled in semi-truckload quantities, while the other traffic is handled in less than truckload quantities, (3) *the traffic* which will be moved by these rates *is unlike other traffic* between the same points, since it is through traffic moving from or to points far beyond appellees' lines, and therein is wholly unlike local traffic with which it is compared by the Commission, and finally (4) the *transportation service* to be afforded is under wholly dissimilar circumstances and conditions. As tacitly admitted in appellants' brief, the facts in this case bring it squarely within the decision in the *Texas & Pacific R. Co. v. I. C. C.*, 162 U. S. 197, and require that the decree on this phase of the case be affirmed, unless the last-named decision be overruled.

No Technical Defects.

With respect to the second issue, the appellees submit that the finding of the Commission, that the tariffs did not contain adequate policing rules, is based upon assumed facts unsupported by anything in the record, and contrary to the actual facts; and that the criticism that the title page incorrectly denominates the suspended rates as "proportional rates" not only is contrary to a long line of decisions by the Commission itself as well as to a large number of identical tariffs now on file with it, but also to decisions of this Court. In any event these matters at most do not concern the merits or substance, but merely form and are capable of ready correction.

Injury.

Appellees further submit that the order of the Commission in this case, being wholly unsupported by any evidence and in practically all instances contrary to the undisputed evidence, is void, and that if such order is allowed to become effective, appellees will be deprived of their business and many of them forced into bankruptcy.

ARGUMENT.

1. The suspended rates do not subject any person or traffic to any unjust discrimination.

The Act.

Section 216 (d) of the Motor Carrier Act provides that it shall be unlawful for a common carrier by motor vehicle: (1) "to make, *give* or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, or description of traffic in any respect whatsoever," or (2) "to *subject* any *particular* person, port, gateway, locality, or description of traffic to any *unjust discrimination* or any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Clause (1) quoted, relating to preference *in favor* of a person, etc., is practically identical with the first clause of section 3 (1) of Part I of the Interstate Commerce Act, and clause (2), relating to *prejudice against any person*, etc., also is identical with a similar clause of section 3 (1) of the Act, except that the phrase "any unjust discrimination" is added. (Italics supplied.)

Prior to the time the language of section 3 (1) of Part I was incorporated into the Motor Carrier Act, this identical language had been construed by the Commission and by this Court uniformly that in order for a particular rate or practice to be unlawful, under the language, the preference or prejudice must advantage one party and operate to the prejudice of or against another party,[8] and further that

[8] California Walnut Growers Asso. v. A. & RR. Co., 50 I. C. C. 558; Board of Trade of Chicago v. A. T. & S. F. R. Co., 29 I. C. C. 438; Beaumont Iron Works v. G. C. & S. F. Rwy. Co., 136 I. C. C. 228; Loose-Wiles Biscuit Co. v. St. L.-S. F. Rwy. Co., 136 I. C. C. 353; Evansville Chamber of Commerce v. A. T. & S. F. Rwy. Co., 196 I. C. C. 349; Red Ball Vegetable Co. v. Illinois Central R. Co., 197 I. C. C. 385; Corporation Commission of N. C. v. A. & R. Co., 200 I. C. C. 571; Utah State Auto Asso. v. A. T. & S. F. Ry. Co., 92 I. C. C. 376; Kloeber v. Northern Pac. Rwy. Co., 96 I. C. C. 437; Boston Port Differential Case, 95 I. C. C. 539; U. S. Phosphoric Products Corp. v. B. A. & P. Ry. Co., 153 I. C. C. 459; Duluth Chamber of Commerce v. C. St. P. M. & O. Ry. Co., 122 I. C. C. 739; I. C. C. v. C. G. W. Ry. Co., 209 U. S. 108.

an order of the Commission correcting such a prejudice must be in the alternative, so that the carrier may be in a position to elect how the prejudice and preference may be ended;[9] and finally that in order to show such prejudice or disadvantage, a competitive relationship between shippers occupying comparable positions must be shown.[10] Under well settled statutory rules, this interpretation of the language became a part of section 216 (d).

The Rates.

The suspended rates are designed principally to enable appellees to continue to handle long-haul through shipments of less-than-carload freight at rates identical with those charged for such shipments by long-haul truck lines and railroads (R. 89, 271). The transportation is performed in connection with other railroad and truck lines through coordination of their services by the forwarding companies. The rates are applicable only to through shipments which either originate or terminate beyond the lines of appellees and are received or delivered immediately following or preceding the movement by connecting carriers (R. 3, 58, 61, Exhibit 1, R. 204). The rates apply on all classes and commodities alike and therein differ from certain of appellees' local rates which apply on specially described "classes" of freight.

Commission's Findings.

The Commission found that the suspended rates "have no different standing under the act than the local rates" (R. 18), and were a device whereby either the forwarders or the shippers for whom the forwarders acted "will be afforded transportation at rates lower than the rates which

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[9] Texas & Pacific R. Co. v. United States, 289 U. S. 627.

[10] Dunn Mfg. Co. v. A. T. & S. F. R. Co., 157 I. C. C. 798; Federated Metals Corp. v. P. R. Co., 161 I. C. C 287; Scott-Omaha Tent etc. Co. v. A. & W. P. R Co., 185 I C. C. 618; B. & M. Motor Co. v. A. & S. Ry. Co., 201 I. C. C. 35.

will be charged certain other shippers under substantially similar circumstances and conditions" (R. 19). The Commission, as stated by Chairman Eastman's dissent: "did not make any finding of undue preference or prejudice; and this is also as it should be, for there is an entire absence of evidence to support any such finding" (R. 22).

Decision Below. The Court below held that the foregoing findings were contrary to the undisputed evidence and that both as a matter of admitted fact and of law the suspended rates were not "unjustly discriminatory," in view of several considerations, *any one of which is sufficient to sustain this holding*, namely: (1) That there was no evidence that the suspended rates would subject anyone to a disadvantage or injury; (2) that compensation under suspended rates was not lower than that charged on other traffic; (3) were applicable for an unlike service; (4) and unlike traffic; and (5) under substantially dissimilar circumstances and conditions (R. 493). We will discuss each of these in the above order.

Disadvantage. The evidence shows that not even a claim was made, much less was there any evidence that any person, shipper, traffic or locality would in any wise be subjected to any disadvantage or prejudice by reason of these suspended rates. Upon the other hand, shippers of local traffic (the only traffic mentioned in the Commission's report) were unanimous in their testimony that there was no discrimination (R. 104, 107, 134). The most casual consideration of the factual situation reveals this to be true. Take, for illustration, the case of a shipper at Racine having customers at Chicago and New York. The through less-than-carload rates, both rail and truck, from Racine to both destinations are those fixed by orders of the Commission. The shipper pays the same rate to either Chicago or New York, whether he uses appellee's

service, an all-truck service, or an all-rail service, the only difference being that where appellees' service is used, the rate is split into component parts. Appellants argue, however, that in the light of *Louisville & Nashville R. Co. v. U. S.*, 282 U. S. 740, no injury need be shown in proceedings under section 2 of Part I of the Act. While examination of the decision in that case will reveal that the court apparently held that from the peculiar circumstances of the case, injury was to be presumed, in the absence of evidence to the contrary,[11] it is unnecessary for the point to be labored here. Under section 2 of Part I, there is no express requirement that the difference be *against* any particular person, whereas in section 216 (d), above quoted, it is unlawful only "*to subject any particular person, etc., to any unjust discrimination.*" Since neither the evidence before the Commission nor its finding shows that "*any particular person or traffic*" was disadvantaged or injured, we submit that, as a matter of law, the rates are not unlawful under section 216 (d) of the Act.

Amending the Act.

Learned Counsel for appellants argue, however, that although the phrase "any unjust discrimination" in clause (2) of section 216 (d) above quoted, is not limited to cases where the discrimination disadvantages another, but that the same phrase is to

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11 So far as we can find the only decision in which the exact question has arisen under section 2 of the Act is in **United States v. Hanley**, 71 Fed. 672, where, at page 673, Judge Grosscup said:

"The language of the statute recognizes that a uniform rate between different shippers is not always possible or proper; that the time of service, the kind of traffic, and the circumstances and conditions under which it is transported may materially change the just obligations and duties of the carrier to his patrons. Equality and uniformity of rate, disassociated from considerations of time, kind, and circumstances of the transactions, is, therefore, not the object aimed at. The object of the statute is to prevent one shipper from getting the advantage over his competitor in the matter of rates only where they both make substantially a like offering to the carrier. There can, therefore, be no conviction under this section until it is alleged and proven that an advantage in rates has been given by the carrier to one person over that obtained by another, where both persons, fairly considered, are upon equality in the time, kind, and circumstance of their offering."

be incorporated by judicial interpretation also into the first clause of that section 216 (d), and hence that it is sufficient for the Commission merely to find, as it did here, that there is *discrimination in favor* of a particular person or traffic. This argument rests upon the theory that Congress intended to make the "rule of equality" of sections 2 and 3 of the Interstate Commerce Act as equally and as fully applicable to Motor Carriers as to carriers under Part I. We submit that under the most elementary rule of statutory construction, neither Commission nor the courts are warranted in amending legislation in this fashion. *Unless such an interpretation is placed upon section 216 (d), the finding of the Commission per se is insufficient to support the order.*

"Unjust Discrimination."

But even if the above position of the appellants is sound, nevertheless, an examination of the record in this case will show that the suspended rates are not unjustly discriminatory as that term is defined in the Act. Section 2 of Part I of the Act defines "unjust discrimination" as the act of charging "any person * * * a greater or less compensation for any service rendered, * * * in the transportation of passengers or property, * * * than it charges * * * any other person * * * for doing for him * * * a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." Under the foregoing definition, the following are indispensable elements of "unjust discrimination": (1) Less compensation charged one person than another; (2) for a like and contemporaneous transportation; (3) of a like kind of traffic; (4) under substantially similar circumstances and conditions. The Court below held that the undisputed evidence upon which the Commission acted shows that none of these four indispensable elements of "unjust discrimination" are present in this case.

Compensation Not Less.

The Commission found "The proposed rates are materially lower than respondents' local rates on like traffic between the same points." (R. 18) No evidence is cited in the report of the Commission to sustain this finding and the Court below held that the evidence showed the exact contrary. At page 5 of appellants' brief, it is attempted to sustain it by citing an illustration of a *first-class* shipment by truck from Racine to Chicago, where the rate would be 48¢ per 100 pounds (R. 329, Exhibit 14) compared with the suspended rate *applicable on all classes of freight* of 30¢ between the same points (R. 212, Exhibit 1). If such a contention is correct, then every commodity rate or mixture which includes articles classified in a class taking a higher rate than the commodity rate is unlawful, and the rates which move the great bulk of American traffic would fall to the ground. It is an understatement to say that the argument is specious. The suspended rates here apply not on first class traffic, but upon *all freight*. Rates so applicable upon all freight have been specifically held by the Commission as not to discriminate against the individual class rates.[12]

Since the suspended rates apply not on first class traffic but on all classes of traffic, to ascertain whether the "compensation" charged is lower or higher than that charged on traffic moving at local class rates, it is necessary to consider all of that traffic. In the exhibit to which appellants refer, other class rates from Racine to Chicago are also shown which are materially lower than the suspended rate for the same service. The evidence, however, does not leave this question in doubt: Not only did witnesses testify from their expert knowledge that the suspended

12 All Freight etc., 223 I. C. C. 421; Commodities Between Chicago and Twin Cities, 226 I. C. C. 356; All Freight Between St. Louis and Kansas City, 234 I. C. C. 589; All Freight Between Harlem River and Boston, 234 I. C. C. 673.

rates on the whole provided greater compensation than the local rates, but a detailed analysis of their traffic for representative periods of time showed conclusively that this was the fact in practically every case.[13]

We therefore submit that the finding of the Court below that the evidence in this case showed that the suspended rates were not lower than the local rates against which they are alleged to discriminate is sustained by the undisputed evidence.

Unlike Service. An indispensable element to a finding of "unjust discrimination" is that the charge be made for a "like and contemporaneous service in transportation." Here again the facts are undisputed. The traffic under these rates moves in truckload quantities, whereas local traffic moves in less than truckload quantities In the handling of l. c. l. shipments, at the local class rates between points involved in these tariffs, each individual less than truckload shipment is handled as a separate and distinct transaction. Take an instance of a shipment from Chicago to Racine. An appellee will call for that shipment at the door of the consignor in Chicago in a local pick-up truck, bring it to his freight depot in Chicago, unload it from the pick-up truck, bill and consolidate it with other l. c. l. shipments moving to Racine and beyond into a line-haul truck, which will carry this shipment to its depot of appellee in Racine, where it will be unloaded, sorted and reloaded on delivery trucks and delivered to the door of the consignor in Racine. In handling traffic under the suspended rates, however, the appellee dispatches its road-haul truck to the door of the freight depot

[13] R. 94, 115, 185, Exhibit 7, R. 93, and R. 281, showing 18.6c per 100 lbs. for local traffic and 24.7c per 100 lbs. for this traffic; and R. 288, 26.91c for local traffic and 26.97c for this traffic; Exhibit 12, R. 113, 323, 24.44c for local traffic and 31.20c for this traffic; Exhibit 18, R. 185, 344, 28c for local traffic and 29c for this traffic. In but two cases was the contrary shown—Exhibit 19, R. 344, and Exhibit 21, R. 348.

of a railroad or other truck line in Chicago and there receives a consolidated consignment consisting of a number of shipments, all sorted and billed, which are loaded on its truck and carried directly to Racine, where they are distributed from the truck to the door of the consignee. This situation can be described no better than in the following quotation from the dissenting opinion of Chairman Eastman (R. 24):

> "Because of the requirement that a movement beyond in carload or truckload quantities must precede or follow the movement to which the suspended rates would apply, respondents would either deliver or receive the latter traffic at the point of interchange in truckload quantities, although it might be, and ordinarily would be, picked up or delivered at the other end of the haul in consecutive small lots. It would thus be what one witness called a 'semi-truckload' movement. In other words, it would be a movement at one end of the haul the characteristics of a concentrated truckload movement, including low unit terminal expense, but fanning out at the other end into a less-than-truckload movement with the high unit terminal expense characteristic of the scattered receipt or delivery of a number of separate small shipments. In contrast, local less-than-truckload movements characteristically have no such concentration at one end of the haul."

Carriage of the traffic subject to the suspended rates does not require the following services which are required in the carriage of local traffic: (1) There is no terminal handling at point of receipt on outbound shipments or at point of destination on inbound shipments; (2) there is no billing required by the carrier; (3) one complete pick-up service at Chicago or at Racine is eliminated. The difference in the transportation service required for traffic which moved under these suspended rates is well illustrated in the number

of local deliveries required to handle the respective types of shipments. An analysis for respective periods of time of operations of several of the appellees showed that on the average vehicles carrying their local stock picked up or delivered about nine-tenths of a shipment of local traffic weighing in the aggregate 758 pounds, whereas in handling the traffic which will move under the suspended rates the vehicles at each stop delivered on the average 8.85 shipments having an aggregate weight of 4,667 pounds. In other words, approximately one-tenth as many deliveries were required to handle shipments which move under these rates as are required to handle the same number of shipments moving at local rates.[14]

Furthermore, the elimination of one of the two terminal operations required by local traffic and not required by this traffic results in a saving in transportation expense to the carrier of about 7¢ per 100 pounds, which is equal to 25% of average revenue received (Ex. 8, R. 154, 291). These facts are undisputed. While they are admitted in the Commission's report (R. 18), it finds that they are entitled to no consideration for two reasons: "Respondents admittedly handle traffic for some shippers which is comparable in these respects with the traffic which they handle for the forwarders" (R. 19). The only traffic so comparable, and with respect to which there was no testimony, was traffic of shippers other than forwarders which would be moved under the suspended tariffs under precisely the same rates as the forwarder traffic. There was no admission and no

[14] The foregoing statement is based upon the averages of the number of shipments per stop, and the weight per stop computed from Exhibits 7 and 8, as follows:

	Shipments per stop		Weight per stop	
	Local	Forwarder	Local	Forwarder
Chicago Heights Trucking Co. (R. 281)	.62	2.14	554	740
Elgin Transfer & Storage (R. 288)	1.06	10.40	370	5760
Service Transport Co. (R. 305)	1.00	14.00	1450	7500
Average	.89	8.85	758	4667

testimony that there was any local traffic "which is comparable in these respects" with the traffic to be handled at these rates. But even if the Commission were warranted in assuming without evidence that there were isolated instances in which a shipper in Chicago would deliver a semi-truckload of freight, as pointed out by Chairman Eastman, "the point is immaterial. * * * Differences in conditions surrounding definite classes of traffic are plainly to be judged by their generally prevailing characteristics, not by sporadic exceptions" (R. 24).

The second ground upon which the Commission refuses to consider this dissimilarity in service is "dissimilarity of conditions which respondents may choose to make by employing different methods of handling like kinds of traffic does not justify dissimilarity in rates" (R. 19). Again, the assumption of the Commission is without warrant in the record. This difference in transportation service is brought about not through any voluntary difference in method of handling, but by the difference in the nature of the service required. The local service requires two terminal operations, including the pick-up and delivery, and there is no way whereby appellees can change their methods however they might wish to do so to avoid this necessity. On the other hand, the traffic which would move under the suspended rates does not require two terminal services, but only one, and appellees are only performing their duty to promote "economical and efficient service," one of the very purposes for which the Motor Carrier Act was passed and a policy enjoined by Congress upon the Commission to promote.[15] As stated by Chair-

15 "Sec. 202. (a) It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; **promote adequate, economical, and efficient service by motor carriers**, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and co-ordinate trans-

man Eastman: "The record shows that the methods of handling differ, not because of any arbitrary choice by respondents, but because the methods fit, in each instance, the essentially different conditions which are encountered" (R. 24).

Unlike Traffic.

The third indispensable requisite to a finding of "unjust discrimination" is that it be with respect to a "like kind of traffic." No finding at all is made by the Commission with respect to this element. Evidently it assumed, contrary to the undisputed evidence, that the traffic which would move under these rates is identical with the traffic moving at the local rates. Witnesses, carrier and shipper alike, testified that the traffic to which these rates are applicable consists of through less-than-carload shipments moving uninterruptedly upon through billing for long distances through the coordinated services of truck lines and railroads and forwarders (R. 80, 81, 97, 125, 128, 133, 147, 151), and the court below so found (R. 490). Such traffic in no degree is similar or related to the local shipments which are originated and terminated by appellees and to which the local rates apply. Throughout the entire range of the Commission's reports it will be found that *through traffic* always has been held to be wholly distinct from and *dissimilar* to *local* traffic. In the original report of Division 5 it is stated: "It is also questionable whether traffic * * * is through traffic" (R. 35). This statement, however, was not repeated in the final report of the Commission. Intervening between the two reports, the Commission decided to the exact contrary the *Freight Forwarding Investigation*

portation by and regulation of motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and co-operate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part." (Emphasis supplied.)

case.[16] In this latter case, it appeared that interstate carload shipments of forwarders were billed to Shreveport, Louisiana, each containing individual packages marked for separate consignees and destinations beyond Shreveport. These shipments were then billed by the Louisiana & Arkansas Railway Company as intrastate less-than-carload shipments from Shreveport to destination, upon the ground that they were intrastate movements. The Commission, however, held:

> "The fact that the unit of shipment is changed from carload to less than carload at the break-bulk points is insufficient to impair the character of the interstate movement. *Western Oil Refining Co. v. Lipscomb*, 244 U. S. 346;" (page 284).

And

> "Such outbound less-than-carload shipments, which are integral parts of interstate carload shipments arriving at Shreveport for movement beyond, upon the facts presented are interstate in character, and the fact that the unit of shipment is changed from carload to less than carload at Shreveport does not impair the character of the interstate movement"[17] (pages 285-6).

This latter finding is in accord with the decision of this Court in B. & O. S. W. Ry. v. Settle, 260 U. S. 166, where the Court held that where there was an intention to move the shipment through "neither through billing, uninterrupted movement, continuous possession by the carrier *nor unbroken bulk* is an essential of a through interstate shipment." (Emphasis supplied.)

This Court in Great Northern Railway Company v. Sullivan, 294 U. S. 458, after holding (at page 460) that:

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16 229 I. C. C. 201, decided October 11, 1938.

17 It is interesting to note that subsequent to the hearing in this case, the Railway Company filed a tariff naming proportional interstate rates from Shreveport applicable upon this traffic and containing provisions identical with those of the tariffs here suspended, which tariff is still in effect and was not condemned by the Commission in this proceeding.

> "A proportional differs from a local rate in that it covers only terminal service at place of receipt or at place of delivery but cannot, as does the local rate, cover both,"

citing Lewis-Simas-Jones Co. v. Southern Pacific Co., 283 U. S. 654, where the Court, in distinguishing between the through and local rates, said at page 663:

> "The tariff, as described in the findings, does not purport to apply to the American part of such international transportation. A carload shipment 'originating' at Nogales or at the point where the line of the foreign carrier and that of the defendant touch the boundary or in defendant's railroad yard adjacent to the boundary clearly must be distinguished from a through carload shipment brought to defendant at the boundary by a foreign carrier. The former covers local transportation only and involves two terminal services, one at Nogales, the point where received from the shipper, and the other at San Francisco, the place where delivered to the consignee. The latter involves the transportation of a through car from the point of connection and only the one terminal service at destination. It is manifest that a tariff limited, as is that described in the findings, to shipments so originating on defendant's line does not apply to the American part of the transportation of an international shipment on a through bill of lading."

The Commission itself again and again has held that rates applicable to a portion of a movement of a through shipment may not properly be compared with local rates, since the traffic and the service are different.[18] The traffic which the undisputed evidence shows will move under the

[18] Indiana Refining Co., Inc., v. L. & N. Ry. Co., 155 I. C. C. 380; Alabama Packing Co. v. Alabama Great Southern Ry. Co., 48 I. C. C. 596; Birmingham Rail & Locomotive Co. v. Alabama Great Southern Ry. Co., 152 I. C. C. 761.

suspended rates, being a wholly different kind of traffic from the local traffic, the assumption underlying the Commission's finding is unwarranted and the finding itself must fail.

Dissimilar Circumstances.

A final indispensable requisite to a finding of "unjust discrimination" is that the transportation service be afforded under substantially similar circumstances and conditions. *The rule of equality, of which so much is made in appellants' brief, is applicable only when there is an equality of conditions.* At an early date it was held by this Court in *I. C. C. v. B. & O. Ry.*, 145 U. S. 263, 284, that carriers "are only bound to give the same terms to all persons alike under the same conditions and circumstances, and that any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge."

The report of the Commission does not consider the undisputed evidence which showed that the conditions surrounding the movement of this traffic were wholly dissimilar from those which obtained with respect to local traffic such as that which moves between a great city such as Chicago and points within its trade or marketing area. From the shipper's standpoint, the evidence was that the manufacturers and merchants at these smaller towns, prior to the advent of the service made possible only by the suspended rates, were at a severe disadvantage with respect to the conduct of their commerce in competition with persons engaged in similar businesses in the larger cities, due to the fact that at such large cities, the comparable service was available through the forwarder consolidation of l. c. l. shipments into carlots which did not require a concentration or distribution truck haul, and that these shippers and receivers of freight and the communities which they serve would be greatly disadvantaged should this service be withdrawn. From the carrier's standpoint, it was shown

that the service provided under these suspended rates was necessary to enable the carriers to provide this service, and to retain this business which they had developed over a long period of time.

The above facts are strikingly similar to those which existed in the case of *Texas & Pacific R. Co. v. Interstate Commerce Commission*, 162 U. S. 197. In that case, the Commission had found[19] that the fact that the carriers were maintaining rates from between seaports and interior towns applicable only on import or export traffic and which were less than the rates for movement of local traffic originating or terminating at the seaport, were unjustly discriminatory under section 2 of the Act. In that case the shippers at the smaller interior towns, just as those similarly situated here, testified that the continuance of such rates was essential to permit them to compete with their competitors at the seaports, and the carriers, that it was necessary in order to permit the traffic to move at all. This Court, after first admonishing the Commission that its attention was "not to be confined to the advantage of shippers and merchants who deal at or near the ports of the United States, in articles of domestic production," but also to consider the interests of the interior cities as well as those of the carrier, held:

> "Moreover, it must not be overlooked that this legislation is experimental. Even in construing the terms of a statute, courts must take notice of the history of legislation, and out of different possible constructions select and apply the one that best comports with the genius of our institutions and is therefore most likely to have been the construction intended by the law-making power. Commerce, in its largest sense, must be deemed to be one of the most important subjects of legislation, and an intention to promote and facilitate it, and not to hamper or destroy it, is naturally to be

[19] New York Bd. of Trade & T. v. Pennsylvania R. Co., 4 I. C. C. 447.

attributed to Congress. The very terms of the statute, that charges must be *reasonable*, that discrimination must not be *unjust*, and that preference or advantage to any particular person, firm, corporation, or locality must not be *undue* or *unreasonable*, necessarily imply that strict uniformity is not to be enforced; but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers, and consumers, should be considered by a tribunal appointed to carry into effect and enforce the provisions of the act.

"The principal purpose of the 2d section is to prevent unjust discrimination between shippers. It implies that, in deciding whether differences in charges, in given cases, were or were not unjust, there must be a consideration of the several questions whether the services rendered were 'like and contemporaneous,' whether the transportation was effected under 'substantially similar circumstances and conditions.' To answer such questions, in any case coming before the Commission, requires an investigation into the facts; and we think that Congress must have intended that whatever would be regarded by common carriers, apart from the operation of the statute, as matters which warranted differences in charges, ought to be considered in forming a judgment whether such differences were or were not 'unjust.' Some charges might be unjust to shippers—others might be unjust to carriers. The rights and interests of both must, under the terms of the act, be regarded by the Commission" (pp. 218, 219).

Appellants (Brief, p. 24) apparently concede that this decision is controlling on this issue, unless it is to be overruled in this case, which they ask upon the ground that the Court looked upon the Interstate Commerce Act (in 1896) as experimental legislation and that there was a strong dissent by three of the Justices. The rule announced in that case has been followed as authority many times in the four

decades which have followed, and, so far as our search reveals, has never before been questioned.

In *Texas & P. R. Co. v. United States*, 289 U. S. 627, 636, 637 (1932), this Court had this to say with respect to the *Texas & Pacific* case, supra:

> "The theory of the Act is that the carriers in initiating rates may adjust them to competitive conditions, and that such action does not amount to undue discrimination. Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 16 S. Ct. 666, 5 Inters. Com. Rep. 465. There the charging of rates on import traffic moving from a port on through bills of lading, much lower than those fixed for domestic transportation was held not to amount as matter of law to discrimination forbidden by section 3. The carrier showed, in justification of the lower rates on import traffic, that unless these were permitted water and rail-and-water competition would divert the traffic away from the port of New Orleans and the carrier's lines extending from that port. *Since that decision it has been recognized that export and import shipments, although not made on through bills, might lawfully be transported at rates below those charged for domestic traffic between the same points.*" (Italics supplied.)

While there was a dissent in the case just cited, it was not upon the point, and today there exists from and to practically every port in the United States rates between such port and the interior which are lower on import traffic than they are on domestic traffic moving between the same inland points.

Judicial Review.

The argument of the learned counsel for appellants is directed largely to establishing the thesis that, regardless of what the facts were before the Commission, the courts are bound by its find-

ings, if such findings per se and without regard to the facts, are rational. We respectfully submit that if this rule is true, then arbitrary power, unfettered by any constitutional or judicial restraint, will be lodged in these administrative bodies. Under such a rule, all that would be necessary for a commission to do would be to ignore entirely the record before it and make such findings as might appear to it necessary or desirable to justify the order which is makes. Any such rule is wholly incompatible with American institutions and system of government.

The rule announced by this Court is that a common carrier has the right to initiate rates, to establish its own rate policies, to make special rates to increase its business, to dispose and apportion its rates so as to meet the necessities of commerce and its own particular situation, and that that right cannot be controlled by the Commission unless and until some provision of the Interstate Commerce Act is infringed. This Court in *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 197, quoted with approval from *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 43 Fed. Rep. 37, 3 I. C. R. 92:

> "Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or advantage or subject to undue prejudice or disadvantage persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits." (40 L. ed. 939.)

While, as argued by learned Counsel, the Commission

may draw inferences, these inferences must be drawn from facts of record and not, as here, from other inferences or from suppositional hypotheses, for, as stated by this Court, speaking through the Chief Justice, in *A. T. S. F. v. I. C. C.*, 284 U. S. 248, 262:

> "But the Commission, exercising the delegated regulatory authority which does not have the freedom of ownership, operates in a field limited by constitutional rights and legislative requirements."

This Court had occasion to apply the rule in a comparatively recent case, *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499 (1935). In that case, a unanimous court, speaking through the late Justice Cardozo, annulled an order of the Interstate Commerce Commission which had ordered cancellation of certain tariffs of the railroad company on the ground that such tariffs were contrary to the policy of the Act and would lead to a disruption of rate structures, impairing the revenues of carriers and their ability to provide adequate and efficient transportation service, and cause a disruption of long standing rate relations existing for competitive purposes among several Indiana groups, from which the Commission concluded that the proposed rates were unreasonable and in violation of sections 1 (5) and 15 (a) (2) of the Interstate Commerce Act. Said this Court:

> "All that the Milwaukee has done is to initiate a schedule which must be upheld as lawful unless adequate reasons are presented for setting it aside. Cf. *Anchor Coal Co. v. U. S.* (D. C.), 25 F. (2d) 462; *Atchison, T. & S. F. R. Co. v. U. S.*, 279 U. S. 768, 773, 73 L. ed. 947, 950, 49 S. Ct. 494." (p. 510.)

The situation is identical here. These carriers initiated these schedules, and there is nothing in this record that in any way shows that they violate the Act in any respect.

2. The suspended tariffs are not technically deficient.

Finding of Commission.

While exceedingly difficult to rationalize, it would appear that the Commission found that the tariffs were technically deficient under the provisions of the tariff section of the Act (217) in two particulars: (1) That they do not contain adequate rules for policing; (R. 19) and (2) that they are lacking in clarity and definiteness because the tariffs denominated the suspended rates as "proportional rates," whereas the Commission found that "they were not in fact proportional rates." (R. 17)

Policing.

The Commission's finding that there was a lack of adequate policing rules is based upon the following statement:

> "Freight forwarders arrange for the transportation not only of freight coming from beyond or going beyond the reforwarding points but of large quantities of freight originating at or destined to such reforwarding points. There is no evidence that respondents would have any way of enforcing provisions against substitution of property originating at or destined to the reforwarding points even if such provisions were incorporated in the tariffs." (R. 20)

This statement of fact with respect to the traffic of freight forwarders was not based upon any evidence in the record and is contrary to the actual fact (which is *not* in the record) which is that while the freight forwarders did have freight originating at the reforwarding points and destined to reforwarding points, none of such freight originates at or is destined to the other points named in these tariffs. It is stated simply to show how far a Commission may go astray, when it attempts to base its findings upon facts not of record.

Assuming, however, the truth of the statement, it will be found that the tariffs provide adequate policing provisions. The policing provisions are practically identical in all of the three tariffs. Referring to the first tariff, (Exhibit 1), it will be found in items 5 and 10 (R. 209) that the rates are applicable only on traffic moving from beyond the breakbulk point as an origin, or moving to the breakbulk point as a destination. In Rule No. 5 (R. 207) it is provided that a period of not more than 48 hours will be allowed at any reforwarding point within which time the shipments must be reforwarded, and under Rules Nos. 10 and 15 (R. 207) the billing upon which the shipment is carried by appellees must show the reference to carriers' billing or manifest, where the shipment comes from beyond, and must show the ultimate destination to which shipment is to be reforwarded, and as these shipments move on the through billing of the forwarding companies, they would necessarily show the original consignor and origin point, and the ultimate consignee and destination point.

We respectfully submit that substitution of tonnage under these circumstances is almost impossible. It can be done only by a deliberate false billing by the shipper. Any rate of any carrier may be avoided and defeated if the shipper sees fit to bill the shipment falsely. For instance, if a sealed box is brought to a carrier, actually containing articles classified, we will say, at a multiple of first class rate, but billed as articles taking the fourth class rate, the carrier has no way of ascertaining whether or not that billing is correct. In other words, if a shipper sees fit to bill fur coats as cotton piece goods, there is no way in which the carrier can police that billing. That policing lies in the provision of the Interstate Commerce Act which makes it a felony for a shipper falsely to bill his freight. If any shipper substituted tonnage under the tariffs in-

volved in this case and bills that tonnage as being a part of a carload consignment breaking bulk in Chicago, when in fact it originated in Chicago, that shipper would be guilty of the same offense of false billing. If it is sufficient protection in one case, it should be sufficient in the other.

Furthermore, in *Southern Pacific Co. v. Interstate Commerce Commission*, 200 U. S. 536, the Court, in annulling an order of the Commission cancelling a tariff rule upon the theory that such rule would permit violations of the law, held: "All the facts referred to by the Commission are nothing but statements as to how, under such a rule, there might occur a violation of that section, but we find nothing in the facts stated by the Commission showing that such violation had occurred. * * * *Because opportunities for the violation of the act may occur by reason of the rule is no ground for holding, as a matter of law, that such violations must occur, and that the rule itself is therefore illegal*" (pp. 555, 556).

Proportional Rates.

The Commission found that the tariffs in question violated section 217 (c) because the tariffs' proposed rates were denominated "proportional rates" when in fact they were not proportional rates. On the title page of the tariffs in question, the tariff is designated one "naming proportional rates between * * * applying on all freight of every class and description * * * when such freight originates at or is destined to stations named herein when final destination or origin is located outside of the States of Illinois or Wisconsin" (R. 204). So far as our examination reveals, this is the only place in the tariff where the term "proportional rates" is used. The tariff rules of the Commission which are in evidence (R. 413, 422, 426) do not require that the title page of a tariff describe the nature of the traffic or the application of the tariff.

There were exhibited in evidence a large number of other tariffs, many approved by the Commission, many naming rates under almost identical circumstances and other under identical circumstances. Despite these uncontradicted facts, the Commission held that the rates were not proportional rates. While we insist that the tariffs are proportional rates under the decisions of this Court[20] as well as an unbroken line of decisions of the Commission,[21] we will not labor that point. At the most the word "proportional" was surplusage. The application of the rates was accurately and definitely described in the tariff proper, and the adequacy of this description was tacitly conceded by the Commission.

This situation is accurately summed up by Chairman Eastman (R. 26):

> "Possibly we could, under our authority to prescribe regulations governing the publication of tariffs, establish rules for the designation of rates, but no such rules could lawfully preclude differences in rates based on differences in circumstances and conditions. The suspended rates are justified by that principle of the law, and whether they are rightly or wrongly termed 'proportional' rates is wholly immaterial. If this designation violates any of our rules, which in fact it does not, the remedy for such a violation is a mere change in the designation and not the final cancellation of the rates."

In any event, it is quite obvious that the alleged technical violations of section 217 (a) and (c) were not sufficient grounds to warrant the Commission in canceling the entire tariffs. The most that it would have been authorized to do, if this were the ground upon which it acted, would have been to require appellees by supple-

[20] See Great Northern Railway v. Sullivan, supra.

[21] See Tariffs Embracing Motor Trucks, 91 I. C. C. 539, 549, Lumber from San Francisco Bay Points, 78 I. C. C. 760.

ment to correct these deficiencies, if any, a frequent procedure.

In *Maritime Ass'n of Boston v. Railroads*, 95 I. C. C. 539, and in *Trunk Line Ex-Lake Iron Ore*, 69 I. C. C. 589, and in *Lake Cargo Coal Rates*, 101 I. C. C. 513, 126 I. C. C. 309, 200 I. C. C. 4, the Commission approved rates on carloads of coal from various shipping points to Lake Erie ports when trans-shipped beyond by water, irrespective of whether the water carrier is a private carrier or a common carrier or the owner.

In *West Virginia Coal & Coke Co. v. Railroads*, 200 I. C. C. 179 (*Ex-Ohio-River Coal to Ohio Points*, 185 I. C. C. 211), and in *American Rolling Mill Co. v. B. & O. R. Co.*, 173 I. C. C. 357, the Commission approved the proportional rates on carloads of coal from Cincinnati which reached Cincinnati by barge in barge lots. In all of these cases the proportional rates were lower than the contemporaneous local rates.

3. **Appellees will be irreparably injured by the order.**

Over a course of years, and with the expenditure of time, effort and capital, these appellees have developed a large traffic. This business constitutes a large part of their total business and if it is lost some of these appellees will be forced into bankruptcy and the operations of all of them will be severely curtailed. At the present moment, the traffic is being handled, as it has been handled for many years past, on the joint through rates of the forwarder companies and appellees. By an order of the Commission the *Acme* case, supra,[22] the joint tariffs naming these rates have been ordered stricken from the Commission's files effective June 11, 1940. The decree of a statutory court of the southern district of New York, dismissing an

22. Acme Fast Freight, Inc., 17 I. C. C. 549.

appeal to annul and set aside the order, has been affirmed by this Court.

Under the suspended tariffs, the rates filed are subject to all the protections and safeguards of the Interstate Commerce Act. The tariffs set out the conditions under which the rates apply. These rates are available to all shippers alike, whether they be forwarders or others. Certainly there is nothing in the Act which denies these appellees the right to continue to handle the traffic which they have developed over many years under rates which are lawful under the provisions of the Interstate Commerce Act, merely because forwarders as well as other shippers may ship at those rates. The Court below on undisputed evidence held that when the order of the Commission in the *Acme* case, supra, becomes effective, appellees here will be unable to handle this traffic any longer unless the suspended rates become effective. The business fortunes of a number of these appellees, as well as their operations, are at stake in this proceeding. No shipper and no carrier having an interest in these rates has protested or complained thereof. So far as this record is concerned, their becoming effective would not injure a single person within the entire United States. If the rates are sustained *no one is disadvantaged. If they are canceled some of appellees are ruined, and the shippers of hundreds of little towns deprived of a necessary transportation service.*

We respectfully submit that the decree of the lower Court, finding the order of the Commission unlawful and void as contrary to the statute and the undisputed evidence, perpetually enjoining its enforcement, should be affirmed by this Court.

Respectfully submitted,

R. E. QUIRK,
JOHN R. TURNEY,
Attorneys for Appellees.

Washington, D. C.
April 15, 1940.

SUPREME COURT OF THE UNITED STATES.

No. 724.—October Term, 1939.

The United States of America and Interstate Commerce Commission, Appellants, *vs.* Chicago Heights Trucking Co., et al.	Appeal from the District Court of the United States for the Northern District of Illinois.

[May 20, 1940.]

Mr. Justice Black delivered the opinion of the Court.

Respondents are forty-one interstate common carriers operating motor vehicles subject to the Interstate Commerce Commission under the Federal Motor Carrier Act of 1935.[1] Our decision turns upon the validity of an order of the Commission cancelling certain proposed tariffs of these carriers upon the ground that they were unlawfully discriminatory in affording lower rates to "forwarders" of freight than to other shippers.

Forwarders utilize common carriers by rail and motor truck to transport goods owned by others. They solicit and obtain many small shipments, from various points within an area, and cause them to be carried in less than truck-load or carload lots to a concentration center within the area. There they are assembled by the forwarder for further transportation in truck-load or carload lots. Although the forwarder gives owners of individual small shipments his own contract corresponding in form to through bills of lading and assumes responsibility for safe through carriage, the forwarder customarily arranges for the pickup, assembly and transportation of the shipments by carriers for hire. And the forwarders, not the owners of the goods, select the carriers and route the shipments. Upon arrival of a truck-load or carload of the assembled small shipments at a distribution center, the bulk shipment is broken up, the forwarder separates and takes possession of the original small shipments and arranges, where necessary, their further carriage to their

[1] 49 Stat. 543.

various final destinations in the area served by the particular distribution point. In this final carriage of the small shipment to its ultimate destination, the forwarder again utilizes carriers for hire to move these less than truck-load or carload lots. Thus, forwarders may use the service of carriers to assemble shipments of less than truck-load or carload lots at their concentration center, to transport the assembled truck-load or carloads to a distribution center and to carry the broken up small shipments beyond their break-bulk distribution center.

The forwarding business has been built upon the expectation that a material part of the transportation which it causes to be provided for small shippers can by consolidation of small shipments be obtained at truck-load or carload rates. For the forwarders' business was originally made profitable because it could operate upon the margin of profit represented by the difference between railroad carload rates paid by the forwarder and the higher rates, approximating less than carload rates, which the forwarder charged the owner of a shipment.[2] But forwarders in using railroads enjoy no special tariff rates and pay the same published carload and less than carload rates that other shippers pay. And the question here is not whether the Commission should have approved as lawful lower rates for truck-loads than for smaller shipments, but whether the court properly set aside the Commission's order which had directed cancellation of respondents' tariffs providing lower rates for certain less than truck-load shipments solely because they had previously been, or were intended subsequently to be, consolidated in truck-loads with other individual shipments.

Upon the Commission's own motion, a hearing was held and the Commission ordered the cancellation of these tariffs.[3] Respondents brought suit in the District Court to set aside and restrain enforcement of the Commission's order. A three judge Court held the order void and perpetually enjoined its enforcement. The case is here on direct appeal by the United States and the Interstate Commerce Commission.[4]

Respondents' tariffs would be available to forwarders who arrange assembling, transportation and distribution services in the

[2] See Int. Comm. Comm. *v.* Del., L. & W. R. R., 220 U. S. 235, 243.

[3] Division 5 first reported, 10 M. C. C. 556. On reconsideration, the report was by the Commission, 17 M. C. C. 573.

[4] 28 U. S. Code, 45, 45(a), 47(a), 345.

trade areas surrounding concentration and break-bulk centers in Illinois, Wisconsin and Indiana. And the Commission found that "In practical effect these rates can be used by few, if any shippers, except the forwarders." Since in its opinion these tariffs were "materially lower than respondents' local rates on like traffic between the same points",[5] the Commission found that "the forwarders . . . and possibly a few large shippers . . . will be afforded transportation at rates lower than the rates . . . charged certain other shippers under substantially similar circumstances and conditions, in violation of Section 216(d)."[6] In the view we take, it becomes unnecessary to consider additional grounds upon which the Commission found the tariffs violated another Section of the Act.[7]

So far as pertinent here, the tariffs before us propose rates for transportation of commodities in less than truck-load lots. All commodities (with exceptions not here material) are as a group given the same special rate. In general, respondents' other tariffs provide rates which vary for different types of commodities. Accordingly, if the suspended rates were in effect, transportation of the same commodity over the same haul might cost a forwarder less than other shippers.

The findings of the Commission and the supporting evidence reveal that local less than truck-load rates charged shippers are in many if not most instances greater than rates on like commodities between the same points to be afforded forwarders under the proposed tariffs which the Commission ordered cancelled. However, upon reviewing the identical evidence which the Commission had

[5] Two Commissioners in dissent thought this was "true only in part. They are lower than some, but by no means all, of the corresponding local rates."

[6] Sec. 216(d): It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, or description of traffic in any respect whatsoever, or to subject any particular person, port, gateway, locality, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

[7] See Sec. 217(a), (b).

[8] The District Court found that some of the local "rates are higher and some lower than the suspended rate", but the average revenue derived by the respondents from local rates "per hundred pounds . . . upon the whole, is less than" that produced by the suspended rates.

considered, the court below drew inferences opposite to those of the Commission and disagreed with its conclusion that in operation the disputed tariffs would violate Section 216(d) which forbids undue preferences and advantages that lead to unjust discrimination. The exercise of judgment by the Commission and by the court in appraising the same evidence has led to these opposing conclusions.

The tariffs apply on "'All freight' (except as otherwise provided . . . , which has been transported to . . . [an] origin station . . . , as a part of a truck-load consignment or carload consignment moving under tariffs or schedules lawfully on file with the Interstate Commerce Commission and immediately reshipped in the original packages as an L. T. L. [less than truck-load] shipment: or

"(b) 'All freight', . . . which is to be transported to . . . [a named] destination station . . . as an L. T. L. shipment, and immediately reshipped in the original package as part of a truck-load consignment or carload consignment moving under tariffs or schedules lawfully on file with the Interstate Commerce Commission."

It is evident that these special tariffs are available only to shippers who intend and are able (a) to arrange immediate further transportation in carloads or truck-loads for commodities that have been carried in less than truck-load lots, or (b) to move commodities in less than truck-load lots immediately after they have been carried as part of a carload or truck-load. While, as has been noted, some few large shippers may possibly avail of the tariffs, there is no question about the finding of the court below that the "principal traffic which will be carried under the suspended rates is what is called by the Commission 'freight forwarder traffic.'"

Almost since its inception the Commission has been called upon to exercise its judgment relative to the Interstate Commerce Act as applied to forwarders.[9] Initial hostility of the railroads caused them to deny forwarders the advantage of their published rates. However, when called upon to decide, the Commission held that the railroads' action discriminated against forwarders and declared for-

[9] See, e. g., Export Shipping Co. v. Wabash R. R. Co., 14 I. C. C. 437; Freight Forwarding Investigation, 229 I. C. C. 201; Acme Fast Freight, Inc., Common Carrier Application, 8 M. C. C. 211.

warders to be entitled as shippers to published carload rates. This Court sustained the action of the Commission.[10]

About 1920, prior to the Motor Carriers Act, forwarders began to utilize motor carriers. Forwarders and truckers operated under individual contracts providing divisions of the complete line haul charge. After the tariff provisions of the Motor Carriers Act went into effect, forwarders filed tariff schedules with the Interstate Commerce Commission on the assumption that they were subject to the Act as common carriers. Tariffs so filed were, however, ordered cancelled by the Commission upon the ground that forwarders were not motor carriers subject to the Act. A three judge District Court upheld the Commission[11] and this Court affirmed.[12]

Here, the complaint itself has alleged that the so-called "proportional" tariffs under consideration "name rates which are identical with" the divisions of through L. C. L. rates which respondents would have received had the forwarders' tariffs been upheld. And, as stated by the Commission, "Stripped of protective coloring, these rates are published as proportional rates primarily as a matter of expediency to serve the purpose of certain freight forwarders and to perpetuate in another form so-called divisions of purported joint rates of the freight forwarded."

Respondents contend that the Commission improperly concluded that the cancelled tariffs create undue preferences or advantages resulting in unjust discriminations in violation of 216(d) because there was no evidence that the suspended rates would subject any particular person or type of traffic to disadvantage or injury; while the suspended rates, applicable on all classes of traffic, might be lower as to some commodities, the aggregate compensation from them would not be less than that from like local traffic if all such local traffic is considered; services rendered by respondents to the forwarders are unlike and less burdensome than local services rendered individual shippers; services rendered the forwarders are on longer hauls than on other local less than truck-load commodity traffic; terminal services rendered forwarders by respondents are less expensive than in the case of other shippers; forwarders bear

[10] Int. Comm. Comm. v. Del., L. & W. R. R, 220 U. S. 235.

[11] 8 M. C. C, 211, Acme Fast Freight, Inc. v. United States, 30 F. Supp. 968

[12] Acme Fast Freight, Inc. v. United States, — U. S. —, April 8, 1940.

the expense of soliciting business thereby relieving respondents of that burden; the only evidence before the Commission was introduced by respondents; and no shippers complained of injury.[13]

Weighty as these arguments were, they did not persuade the Commission that forwarders could without discrimination be given lower L. T. L. rates than other shippers. The Commission was impressed by the facts that the proposed rates were not in reality available to all of the shipping public and in practical effect would operate for the special benefit of the forwarders and would not benefit the owner of goods shipped; that Section 216(d) of the Act represented a manifestation of the congressional purpose in Part I, Sec. 2, and Part II, Sec. 202(a) of the Interstate Commerce Act, to prevent favoritism by insuring equality of treatment on rates for substantially similar services; and that the proposed tariff would afford "forwarders . . . ., and possibly a very few large shippers . . . ., transportation at rates lower than the rates which . . . [would] be charged certain other shippers under substantially similar circumstances and conditions in violation of Section 216(d)." Moved by these considerations, the Commission concluded that the mere fact that forwarders might ordinarily furnish a volume of traffic greater than but identical in kind with that furnished by individual shippers did not justify lower rates for forwarders.

"It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which, from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed."[14] And where a court substituted "its judgment as to the existence of preference for that of the Commission on the ground that where there was no dispute as to the facts it had a right to do so, [the court] obviously exerted an authority not conferred upon it by the statute."[15] So here, it has been pointed out that there was no dispute in the evidence before the Commission, all of which was introduced by respondents. But the differing inferences as to discrimination finding possible support in that evidence are made to stand out by the

[13] These arguments for sustaining the tariffs were all forcefully presented in the dissenting opinion of Chairman Eastman, concurred in by Commissioner Mahaffie.

[14] United States v. Louisville & Nashville Railroad Co., 235 U. S. 314, 320.

[15] *Id.*

ersuasive reasoning advanced in both the majority and minority pinions of the Commission. The Interstate Commerce Act does not ttempt to define an unlawful discrimination with mathematical recision. Instead, different treatment for similar transportation ervices is made an unlawful discrimination when "undue", "unust", "unfair", and "unreasonable". And the courts have alays recognized that Congress intended to commit to the Commission the determination, by application of an informed judgment to xisting facts, of the existence of forbidden preferences, advantages nd discrimination.[16]

A special allowance to a forwarder as an inducement to ship oods by a particular carrier would be an illegal rebate.[17] Similarly, and as previously pointed out, forwarders are shippers protected by the Interstate Commerce Act from discrimination by carriers.[18] As shippers, forwarders do business subject to the paramount principle that Congress intended our national transportation system to operate without favoritism. Pursuant to its duty o apply that principle upon a national scale, the Commission can revent unjust rate discrimination by carriers against other shipers and in favor of forwarders. The particular problem here inolved is but a segment of the larger complicated national problem f rates with which the Commission must deal. As exemplified by his record, the Commission is "informed by experience"[19] of years n its consideration of the relationship of forwarders to our national ransportation system.

The fact that the Commission acted on its motion without complaints by individual shippers did not detract from the Commission's power to protect and maintain a transportation system free rom partiality to particular shippers. The Commission acted in

[16] Swayne & Hoyt Ltd. v. United States, 300 U. S. 297, 304; Interstate Comm. Comm. v. Del. L. & W. R. R., *supra*, at 255; Manufacturers Ry. Co. v. United States, 246 U. S. 457, 481. Texas & Pac. Ry. v. Interstate Comm. Comm., 162 U. S. 197, represents an apparent exception, at an early date before the function of the Commission had become fully outlined against the background of time and the empiric pattern of litigation. (Commission's bill to enforce its holding that the difference between domestic and imported merchandise could not justify different rates between the port of reception and point of delivery, ordered dismissed).

[17] Lehigh Valley R. R. Co. v. United States, 243 U. S. 444.

[18] Interstate Comm. Comm. v. Del. L. & W. R. R., *supra*, at 255.

[19] Cf. Standard Oil Co. v. United States, 283 U. S. 235, 239; Illinois Central R. Co. v. Interstate Comm. Comm., 206 U. S. 441, 454.

its capacity as a public agency and carried out duties imposed upon it by Congress in the interest of shippers generally, the national transportation system and the public interest.[20] Its order was the embodiment of the Commission's judgment that the proposed tariff was a discrimination prohibited by the Act. "The judgment so exercised, being supported by ample evidence, is conclusive."[21]

The judgment of the court below is reversed and the bill is ordered dismissed.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[20] Cf. Inland Steel Co. v. United States, 306 U. S. 153, 157.

[21] United States v. Illinois Central R. R., 263 U. S. 515, 525, 526.